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In The Supreme Court of the United States

SHERRI WILLIAMS; B.J. BAILEY; ALICE JEAN COPE; JANE DOE; DEBORAH L. COOPER; BENNY COOPER; DAN BAILEY; JANE POE; JANE ROE,

Petitioners,

v.

TROY KING, in his official capacity as the Attorney General of Alabama,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Paul John Cambria, Jr.
Counsel of Record
LIPSITZ GREEN SCIME & CAMBRIA, LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

Counsel for Petitioners

Of Counsel:

Roger W. Wilcox, Jr.
Amy L. Herring

THE LEX GROUP^{DC} • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

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INTRODUCTION

Petitioners submit this reply brief in response to the Brief of Respondent in Opposition to petitioners' request that this Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals. In this reply, petitioners address two serious weaknesses in respondent's arguments in opposition.

REASONS FOR GRANTING THE PETITION

I. The State of Alabama's Restrictions on the Commercial Sale of Sexual Devices Within the State Impermissibly Burdens Consensual Private Conduct Protected By The Due Process Clause To The Same Extent As The Private Sexual Conduct In *Lawrence v. Texas.*

Respondent's brief in opposition to the instant petition for a writ of certiorari does not persuasively counter petitioner's leading constitutional argument in support of invalidation of Alabama Code § 13A-12-200.2(a)(1): that the Eleventh Circuit incorrectly distinguished this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) on the ground that *Lawrence* protected private sexual conduct while the challenged Alabama sexual device statute prohibits public, commercial activity. Respondent comments merely that the Alabama law does not impair a fundamental right because it restricts only the availability of sexual devices through public, commercial transactions. (Brief in Opposition, p. 19).

Petitioners respectfully submit that respondent has failed to directly oppose their central argument that Alabama's prohibition of the commercial distribution of sexual devices within the state impermissibly burdens the exercise of petitioners' liberty under the Due Process Clause to utilize sexual devices in the context of their intimate relationships and private conduct. Respondent's oblique argument on this important point appears to be that petitioners do not have a fundamental right to engage in certain commercial transactions. This response ignores a substantial reason for granting the requested writ: that the due process right to use sexual devices in private cannot be defeated by a state law eliminating the commercial availability of such devices within its borders.

Indeed, in a prior decision in this case, the Eleventh Circuit explicitly recognized that "[f]or purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item," *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1242 (11th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005). However, in the decision petitioners seek to have this Court review, the Court of Appeals ignored the obvious private impact of restrictions on the commercial sale of sexual devices despite acknowledging that *Lawrence* rejected public morality as a legitimate government interest for laws that target private conduct, and distinguished the challenged law on the ground that "[t]his statute targets *commerce* in sexual devices, an inherently public activity, whether it occurs on a street corner, in a shopping mall, or in a living room." *Williams v.*

King, 478 F.3d at 1322 (emphasis in original). Aside from the question of whether in-home "Tupperware-style" private parties at which sexual devices are displayed and sold are *inherently* public activities, respondent fails to explain a significant inconsistency in the Eleventh Circuit's analysis of the interplay between privacy rights and regulation of commercial activities related to the enjoyment of those private rights: on the one hand, the Court of Appeals recognizes that a privacy right to use sexual devices cannot be denied merely because the state desires to eliminate their commercial availability but, on the other hand, the Court of Appeals rejects the privacy protections of *Lawrence* precisely because the Alabama law prohibits commerce in sexual devices.

Petitioners contend that the Court of Appeals should have ruled that Alabama's restrictions on the commercial sale of sexual devices directly and impermissibly burden the private use of such devices. *See, e.g., Carey v. Populations Services International*, 431 U.S. 678, 687-88 (1977). Having acknowledged that *Lawrence* invalidates laws that target intimate conduct that is private, *Williams v. King*, 478 F.3d at 1322, the Eleventh Circuit should have also recognized that Alabama cannot significantly restrict the commercial availability of sexual devices without impairing petitioners' liberty under the Due Process Clause to use such devices in their intimate relations or private conduct. Respondent's brief in opposition simply reiterates the rationale of the Court of Appeals without eliminating its structural inconsistency. Consequently, petitioners pray that this Court will

grant the requested writ of certiorari to remedy a defective constitutional analysis that will undoubtedly influence other privacy decisions in the United States.

II. The Court Should Issue a Writ of Certiorari to Eliminate the Need for Constant Clarification of the *Lawrence* Holding in Lower Federal and State Courts, and to Establish Consistency with Certain State Court Decisions Regarding the Validity of Sexual Device Laws.

Respondent describes numerous cases that have analyzed the *Lawrence* decision in a variety of legal contexts, including a state court decision highlighting that "the *Lawrence* opinion has been distinguished more than forty times since it was issued." *State v. Holm*, 137 P.3d 726, 743 n.10 (Utah 2006); Brief in Opposition, pp. 15-16. Several of these cases have focused on the question of whether *Lawrence* created a fundamental right to sexual privacy—an issue that is vigorously debated in the context of the particular liberty interest analysis used by the Court in *Lawrence*. *See, e.g., United States v. Extreme Associates, Inc.*, 431 F.3d 150 (3d Cir. 2005). Indeed, the exact nature of the fundamental rights/liberty interest analysis utilized by the Court in *Lawrence* is a central issue in petitioners' case, with petitioners contending that *Lawrence* evaluated the privacy interests at stake there using a "protected liberty" analysis in which the state's interests are balanced against the liberty interests of the individual in a test that is more

stringent than mere rational basis review. Granting of the requested writ of certiorari would afford the Court an opportunity to finally put to rest any confusion as to the exact standard it applied in *Lawrence*.

Further, issuance of a writ of certiorari in this case would allow the Court to resolve, on a federal constitutional basis, inconsistencies between state court decisions that acknowledge rights of personal privacy protected by the Due Process Clause that required invalidation of statutes impermissibly restricting the commercial distribution of sexual devices, *see, e.g.*, *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990), and state court decisions that reject the existence of such rights as they relate to sexual devices. *See, e.g.*, *State v. Brenan*, 772 So.2d 64 (La. 2000); *Yorko v. State*, 690 S.W.2d 260 (Tex. Crim. App. 1985).

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit so that they may have a full and fair opportunity to vindicate their rights to privacy and liberty under the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

Paul John Cambria, Jr., Esq.
Counsel of Record
LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

Of Counsel:

Roger W. Wilcox, Jr., Esq.
Amy L. Herring, Esq.